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Michael J. Mazurczak, *Critical Analysis of Rule 11 Sanctions in the Seventh Circuit*, 72 Marq. L. Rev. 91 (1988).
Available at: <http://scholarship.law.marquette.edu/mulr/vol72/iss1/6>

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CRITICAL ANALYSIS OF RULE 11 SANCTIONS IN THE SEVENTH CIRCUIT

I. INTRODUCTION

Federal Rule of Civil Procedure 11¹ was amended² in August 1983³ "to

1. The following text shows the additions and deletions affected by the 1983 amendment (italicized portions show additions, brackets show deletions):

Rule 11. Signing of Pleadings, *Motions, and Other Papers*; Sanctions

Every pleading, *motion, and other paper* of a party represented by any attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, *motion, or other paper* and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney *or party* constitutes a certificate by him that he has read the pleading, *motion, or other paper*; that to the best of his knowledge, information, and belief [there is good ground to support it; and that it is not interposed for delay] *formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.* If a pleading, *motion, or other paper* is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. [or is signed with the intent to defeat the purpose of this rule; it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.] *If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.*

2A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE § 11.01[3] (2d ed. 1948). The 1983 amendments were effective August 1, 1983. 97 F.R.D. 165 (1983).

2. Amendments to the Federal Rules of Civil Procedure, 461 U.S. 1095, 1099 (1983). Rules 7, 11, 16 and 26 of the Federal Rules of Civil Procedure were amended in 1983 as part of what Professor Arthur Miller, the reporter to the Advisory Committee, has called "an integrated package." A. MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 2 (Federal Judicial Center 1984). Rule 7 was amended to make *explicit* that the certification requirement and sanction provisions of Rule 11 are applicable to motions and other papers. FED. R. CIV. P. 7(b)(3). Rules 16 and 26 were amended, in part, to include the following sanction provisions:

If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or his own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing him or both to pay the

dam the flood of litigation that [was] threatening to inundate the courts."⁴ Amended Rule 11, as part of a broad reform effort,⁵ is intended to combat the climbing cost of litigation⁶ and to deter misuse or abuse of the judicial system by the mandatory imposition of sanctions on attorneys who violate the Rule.⁷ Although the new Rule took effect with the stated goal to "reduce frivolous claims, defenses or motions by leading litigants to stop, think

reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

FED. R. CIV. P. 16(f).

Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state his address. The signature of the attorney or party constitutes a certification that he has read the request, response or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

FED. R. CIV. P. 26(g).

3. By order of April 28, 1983, the United States Supreme Court adopted amendments to the Federal Rules of Civil Procedure including Rule 11. Amendments to the Federal Rules of Civil Procedure, 461 U.S. 1095 (1983). This order states in part, "[T]he foregoing . . . amendments to the Federal Rules of Civil Procedure shall take effect on August 1, 1983 and shall govern all civil proceedings thereafter commenced and, insofar as just and practicable, in proceedings then pending." *Id.* at 1097; see also *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 829 n.5 (9th Cir. 1986) (FED. R. CIV. P. 16, as amended, authorizes sanctions for delay caused by inadequate preparation for scheduling and pretrial conferences.). For a thorough description of the existing procedures by which rules and rule amendments are now drafted, reviewed and promulgated, see W. BROWN, *FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES* 5-8 (1981).

4. Carter, *The History and Purposes of Rule 11*, 54 *FORDHAM L. REV.* 4, 4 (1985).

5. See generally Address by Arthur R. Miller, Annual Judicial Conference of the Second Judicial Circuit of the United States (Sept. 30, 1983), reprinted in 101 *F.R.D.* 161, 198 (1984) (commenting on the litigation crunch problem).

6. See generally Symposium: *Reducing the Costs of Civil Litigation*, 37 *RUTGERS L. REV.* 217 (1985) (providing statistical analysis of the cost and volume of litigation).

7. See Schwarzer, *Sanctions Under the New Federal Rule 11 — A Closer Look*, 104 *F.R.D.* 181, 183 (1985).

and investigate more carefully before serving and filing papers,"⁸ the "satellite litigation"⁹ which the Rule has spawned is "fast becoming the cottage industry of the 1980's."¹⁰

After more than 1000 cases and four years,¹¹ the debate persists over the interpretation and application of amended Rule 11. Some critics suggest that the new Rule has the capacity to chill vigorous, non-frivolous advocacy of attorneys in representing their clients.¹² Others maintain that the threat of sanctions is not tantamount to the dampening of a lawyer's creativity.¹³ These two competing approaches have surfaced as a result of inconsistent decisions by federal courts which have considered Rule 11. While some courts are lenient in their imposition of sanctions, others, such as the Seventh Circuit Court of Appeals, are notoriously aggressive in enforcing this new legal mandate.

This Comment traces briefly the history of Rule 11 and the policy concerns that led to its amendment in 1983. A presentation and analysis of the substantive elements of amended Rule 11 follows. Next, this Comment critiques several recent decisions of the Seventh Circuit Court of Appeals and discusses its arbitrary application of Rule 11. Finally, this Comment concludes by recognizing that continued utilization of capricious sanctions will have an adverse impact on litigation in the Seventh Circuit.

II. RULE 11 PRIOR TO 1983

A. Origin of Attorneys' Fees

Abuse of the litigation process was first addressed in 1813¹⁴ when Congress enacted a statute which concerned recovery for attorneys' costs. The

8. *Report of the Judicial Conference Committee on Rules of Practice and Procedure*, app. C (March 9, 1982) (comments of Chairman Mansfield), reprinted in 97 F.R.D. 190, 192 (1983).

9. FED. R. CIV. P. 11 advisory committee notes.

10. Marcotte, *Rule 11 Changes — Blessing or Curse?*, 72 A.B.A. J. 34 (Sept. 1, 1986) (quoting Arthur Miller).

11. See Bates, *The Rule 11 Debate, 4 Years Later*, Nat'l L.J., Oct. 12, 1987, at 3, col. 1.

12. See, e.g., Nelken, *Sanctions Under Amended Federal Rule 11 — Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313 (1986); Schwarzer, *supra* note 7, at 184; Snyder, *The Chill of Rule 11*, 11 LITIGATION 16, 55 (Winter 1985); Weiss, *A Practitioner's Commentary on the Actual Use of Amended Rule 11*, 54 FORDHAM L. REV. 23 (1985); Comment, *Ask Questions First and Shoot Later: Constraining Frivolity in Litigation Under Rule 11*, 40 U. MIAMI L. REV. 1267 (1986); Note, *The 1983 Amendments to Rule 11: Answering the Critics' Concern With Judicial Self-Restraint*, 61 NOTRE DAME L. REV. 798 (1986) (hereinafter *Answering the Critics*); Note, *Rule 11 Sanctions: Toward Judicial Restraint*, 26 WASHBURN L.J. 337 (1987).

13. See FED. R. CIV. P. 11 advisory committee notes.

14. See Schwarzer, *supra* note 7, at 182; see also *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 759 (1980) (quoting Act of July 22, 1813, 3 Stat. 21). Under the traditional "American Rule," each side in litigation bears its own attorneys' fees and expenses. The "American Rule"

statute specifically provided that any attorney who "multiplied the proceeding in any cause . . . so as to increase costs unreasonably and vexatiously" could be liable for "any excess of costs so incurred."¹⁵ This provision, codified as 28 U.S.C. § 1927,¹⁶ was amended by Congress to permit recovery of expenses and attorneys' fees in addition to costs.¹⁷ Presently, the imposition of sanctions under this statute is limited to attorneys whose conduct is both "unreasonable and vexatious."¹⁸

In 1842, another bastion against misuse of the judicial system was afforded by Equity Rule 24. Equity Rule 24 dealt with the elimination of scandalous or impertinent matters in pleadings. Prior to the enactment of Rule 24, an attorney needed only to attest to the form, not the substance of a bill or pleading.¹⁹ Rule 24 expanded this mandate to require the attorney's signature on every bill or pleading as "an affirmation" that there was "good ground" to support it.²⁰ This more comprehensive view of the function of the attorney's signature was noted by the Advisory Committee on Rules for Civil Procedure in the committee's effort to formulate Rule 11.²¹ Thus, Equity Rule 24 was the basis for Rule 11, which was first adopted as part of the Federal Rules of Civil Procedure in 1938.²²

differs from practice in England where, since 1278, courts have been authorized to award counsel fees to prevailing plaintiffs. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967).

15. *Roadway Express*, 447 U.S. at 759. This provision is now codified at 28 U.S.C. § 1927.

16. 28 U.S.C. § 1927 (1982) now provides:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Id.

17. *Id.* Section 1927 does not authorize the imposition of damages and costs upon parties. *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986); *Maneikis v. Jordan*, 678 F.2d 720, 723 (7th Cir. 1982) (per curiam).

18. Schwarzer, *supra* note 7, at 182. BLACK'S LAW DICTIONARY 1403 (5th ed. 1979), defines vexatious as "without reasonable or probable cause or excuse" (emphasis added).

Even under the present section 1927, the "blissfully ignorant" attorney who files a frivolous claim, even if objectively unreasonable and vexatious, has been spared section 1927 sanctions. See *Zaldivar*, 780 F.2d at 831.

19. Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 9-13 (1976).

20. *Id.* at 52-61. The "good ground to support" rule seems to derive from Supreme Court Justice Story's discussion of the signature requirement in his treatise on equity practice. J. STORY, EQUITY PLEADINGS 48 (10th ed. 1892).

21. 1 F.R.D. lxxxii (1938).

22. Risinger, *supra* note 19, at 13.

B. Original Rule: 1938 to 1983

Rule 11, as first expressed,²³ stated in part that the signature of an attorney "constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay."²⁴ This signature certification eliminated the prior practice of using affidavits by a party to verify pleadings.²⁵ Under the original Rule, there were two distinct sanctioning provisions: the "sham and false" provision and the "willful" violation section.²⁶

1. The "Sham and False" Provision

Under the first provision of original Rule 11, unsigned pleadings, or pleadings signed with an intent to defeat the purpose of the Rule,²⁷ could be stricken "as sham and false." The action would then continue "as though the pleading had not been served."²⁸ This, however, was an unduly harsh

23. The United States Supreme Court promulgated Rule 11 of the Federal Rules of Civil Procedure pursuant to the Rules Enabling Act of 1934. Act of June 19, 1934, Pub. L. No. 73-415, § 1, 48 Stat. 1064. Rule 11 remained unchanged until amended in 1983.

24. Rule 11 of the Federal Rules *originally* provided:

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay or is signed with intent to defeat the purpose of this rule; it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

FED. R. CIV. P. 11 (amended 1983). For cases in which courts applied the original Rule, see *Murchison v. Kirby*, 27 F.R.D. 14, 19 (S.D.N.Y. 1961) (attorney assumed that good grounds supported allegations satisfying good faith standard); *United States v. Long*, 10 F.R.D. 443, 445 (D. Neb. 1950) (attorney's signature as evidence of good faith).

25. *Answering the Critics*, *supra* note 12, at 798. For an analysis of Rule 11 as originally adopted, see Note, *Reasonable Inquiry Under Rule 11 — Is the Stop, Look, and Investigate Requirement a Litigant's Roadblock?*, 18 IND. L. REV. 751, 753-58 (1985).

26. Carter, *supra* note 4, at 7. Although the original Rule focused on an attorney's conduct, the enforcement provisions were aimed at the client. Nelken, *supra* note 12, at 1315.

27. FED. R. CIV. P. 11 (amended 1983). For the text of the original Rule, see *supra* note 24. The original Rule was designed to regulate honesty in pleading practice. See Risinger, *supra* note 19, at 4 (goal of Rule 11 is honesty in pleadings). Although the language of the Rule was directed primarily at lawyer honesty, the provision for striking as sham historically required both a determination of the dishonesty of the pleader and of the falsity of the pleading. *Id.* at 16.

28. See *supra* note 24.

sanction which penalized the client as well as the attorney for the attorney's misconduct. As the Advisory Committee Notes to the 1983 amendments state, this sanction was rarely utilized.²⁹ Because federal judges were reluctant to levy this radical sanction, a very high threshold for its imposition was established.³⁰

As a result of this very high threshold, the first "genuine adversary Rule 11" motion³¹ to strike a pleading as "sham" did not occur until 1950 in *United States v. Long*.³² In *Long*, a district court rejected the motion to strike the defendant's general denial of the plaintiff's complaint.³³ Although

29. FED. R. CIV. P. 11 advisory committee notes. Professors Wright and Miller state: A motion to dismiss as sham under Rule 11 should not be granted if there is any possibility that the party can prove his case. Appropriately, the courts have been reluctant to characterize a pleading as sham unless it contradicts matters of public record. As was noted by the Supreme Court in the early case of *Bates v. Clark*, '[a motion to strike a plea as sham and frivolous] is an unscientific and unprofessional mode of raising and deciding a pure issue of law. . . . A motion to strike out a plea is properly made when it has been filed irregularly, is not sworn to, if that is required, or wants signature of counsel, or any defect of that character; but if a real and important issue of law is to be made, that issue should be raised by demurrer.' Rule 11 should not be used to raise issues of legal sufficiency that more properly can be disposed of by a motion for a more definite statement or by a motion for summary judgment. The signature rule, which is designed to encourage honesty in the bar when bringing and defending actions, ought to be employed only in those rare cases in which an attorney deliberately presses an unfounded claim or defense.

5 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1334, at 502-03 (1969) (quoting *Bates v. Clark*, 95 U.S. 204, 205-06 (1877)). Risinger, *supra* note 19, at 34-35, stated that only twenty-three cases involved an attempt to strike a pleading as "sham" under Rule 11 from 1938 to 1976. It was also reported that failure to sign was never used as the basis to strike a pleading. *Id.* at 15. *But cf.* *United States ex rel. Sacks v. Philadelphia Health Management Corp.*, 519 F. Supp. 818 (E.D. Pa. 1981) (pleading was struck for failure to sign). However, courts usually denied motions to strike pleadings, relying on the presumption that counsel had filed the pleading in good faith. *See, e.g., Lau Ah Yew v. Dulles*, 236 F.2d 415, 416 (9th Cir. 1956); *Murchison*, 27 F.R.D. at 19; *Long*, 10 F.R.D. at 445.

For a comprehensive survey of pre-1983 practice under Rule 11, see Note, *Civil Procedure — The Demise of a Subjective Bad Faith Standard Under Amended Rule 11*, 59 TEMP. L.Q. 107, 115-21 (1986).

30. *See, e.g., Incomco v. Southern Bell Tel. & Tel. Co.*, 558 F.2d 751, 753 (5th Cir. 1977) (plaintiff had no capacity to sue); *Bertucelli v. Carreras*, 467 F.2d 214, 215 (9th Cir. 1972) (pleading could be stricken only if it contradicted matters of public record); *Child v. Beame*, 412 F. Supp. 593, 600 (S.D.N.Y. 1976) (citing *Murchison*, 27 F.R.D. at 19 (pleading could be shown to be sham and false beyond peradventure)).

31. Risinger, *supra* note 19, at 35. In his 1976 article, Risinger found only nineteen Rule 11 motions. *Id.* Wright, Miller, and Kane cite approximately forty cases decided between 1975 and 1983 that deal with Rule 11 issues other than failure to sign pleadings. 5 C. WRIGHT & A. MILLER, *supra* note 29, § 1332-34 (1983 Supp.).

32. 10 F.R.D. 443 (D. Neb. 1950).

33. *Id.* at 445. In the complaint, the plaintiff supported allegations of the defendant's loan default with evidence of five promissory notes and records of partial repayment of those notes. *Id.* The court doubted that a general denial could be submitted unless the defendant's attorney intended to deny that any relationship existed between the parties. *Id.*

the court recognized that a defendant had no right to deny any allegation for the sole purpose of charging the plaintiff with the expense of proof, the court relied on the attorney's signature as evidence of good faith.³⁴ Another court held that a Rule 11 motion should be granted to strike a pleading only when it was apparent beyond question that the pleading was "sham and false."³⁵

2. The "Willful" Violation Section

The second provision regarding sanctions in original Rule 11 was the "willful" violation provision. Under this provision an attorney *could* "be subjected to appropriate disciplinary action"³⁶ for a willful violation of the Rule. Like the "sham and false" provision, this determination to discipline an attorney was discretionary with the court. Since former Rule 11 did not articulate which types of disciplinary action might be taken by the court³⁷ and since the predominant interpretation penalized only that conduct of a lawyer undertaken in subjective bad faith, sanctions were infrequently imposed.³⁸ Judicial reluctance to use the rule to award attorneys' fees also stemmed from confusion as to whether it was even permissible to make such an award pursuant to Rule 11 alone.³⁹ Only in rare circumstances did sanctions occur.⁴⁰

34. *Id.*

35. *Murchison*, 27 F.R.D. at 14. The case involved a shareholder's derivative action to set aside, as fraudulent, a settlement of an earlier derivative suit. *Id.* at 16-17. The defendants alleged that the plaintiffs' attorney signed the complaint in bad faith. *Id.* at 18. The court concluded that granting the Rule 11 motion would be inappropriate because it would deprive the plaintiffs of their right to trial. *Id.* at 19.

36. FED. R. CIV. P. 11; see 5 C. WRIGHT & A. MILLER, *supra* note 29, at 501.

37. FED. R. CIV. P. 11 advisory committee notes, 97 F.R.D. at 200, reprinted in 2A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE § 11.02[2], at 11-12 (1985).

38. It would appear that only in rare circumstances did the federal courts rely solely on former Rule 11 in awarding attorneys' fees. Note, *supra* note 29, at 120. Between 1950 and 1976 only one such case was reported. *Risinger*, *supra* note 19, at 37 n.123. See *Kinee v. Abraham Lincoln Fed. Sav. and Loan Ass'n*, 365 F. Supp. 975, 983 (E.D. Pa. 1973) (attorneys' fees imposed under Rule 11 against plaintiffs' attorney who failed to investigate properly factual basis of allegations before filing a complaint against incorrectly named defendants).

39. See, e.g., *Nemeroff v. Abelson*, 620 F.2d 339, 350 (2d Cir. 1980) (court uncertain as to permissibility of awarding attorneys' fees as sanction under Rule 11); *Republic of Cape Verde v. A & A Partners*, 89 F.R.D. 14, 19-20 (S.D.N.Y. 1980) (award of counsel fees under Rule 11 was virtually unprecedented); *Ferrer Delgado v. Sylvia de Jesus*, 440 F. Supp. 979, 982 (D.P.R. 1976) (court only mentioned Rule 11 in awarding defendant her attorneys' fees under a local rule regarding false complaints); *Spencer v. Dixon*, 290 F. Supp. 531, 535 (W.D. La. 1968) (court dismissed plaintiff's complaint under both Rule 11 and Rule 12(f)).

40. See *supra* note 38.

Occasionally, where a court found that an attorney acted with subjective bad faith which qualified as a willful violation of Rule 11,⁴¹ the court imposed attorneys' fees "as an exercise of their inherent equitable powers, or under a specific statutory provision relating to the substantive claims,"⁴² or under 28 U.S.C. § 1927.⁴³ Other courts found authority for imposing attorneys' fees based on any combination of the above grounds. In these early applications of the Rule, a violation was used only to support a court's decision.⁴⁴ The subjective bad faith standard which was required to impose sanctions against an attorney enabled courts to arbitrarily select the basis on which to assess attorneys' fees.⁴⁵

3. Original Rule 11: A Failed Remedy

While judicial hesitation to utilize Rule 11 sanctions and the difficulty of showing subjective bad faith combined to nullify the influence of original Rule 11 on litigation,⁴⁶ misuse of the litigation process and congestion of the federal court dockets continued to grow.⁴⁷ In 1976, Chief Justice Warren Burger reflected on these concerns when he stated: "Correct or not, there is . . . a widespread feeling that the legal profession and judges are overly tolerant to lawyers who exploit the inherently contentious aspects of the adversary system to their own private advantage at public expense."⁴⁸

41. See *North Am. Foreign Trading Corp. v. Zale Corp.*, 83 F.R.D. 293 (S.D.N.Y. 1979), where the court found authority for imposing attorneys' fees in section 1927, Rule 11 and the court's inherent equitable powers. *Id.* at 297-98. Although the court acknowledged that Rule 11 gave it the power to award fees, the court relied solely on section 1927 in its decision. *Id.*

42. Note, *supra* note 29, at 118.

43. For the text of the statute, see *supra* note 16.

44. See *supra* notes 38 and 41.

45. See *Textor v. Board of Regents of Northern Ill. Univ.*, 87 F.R.D. 751 (N.D. Ill. 1980). Although the court found a willful violation of Rule 11, the court imposed sanctions based on both Rule 11 and its own inherent equitable powers. *Id.* at 754.

46. FED. R. CIV. P. 11 advisory committee notes. "There has been considerable confusion as to (1) the circumstances that should trigger striking a pleading or motion or taking disciplinary action, (2) the standard of conduct expected of attorneys who sign pleadings and motions, and (3) the range of available and appropriate sanctions." *Id.* (citing R. RODES, K. RIPPLE & C. MOONEY, *SANCTIONS IMPOSABLE FOR VIOLATIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE* 64-65 (1981)).

47. Nelken, *supra* note 12, at 1316; see also ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1984). The number of cases pending in the district courts rose from 140,189 in 1976, to 231,920 in 1983, an increase of 65.4%. *Id.* (table 4).

48. Address by Chief Justice Warren Burger, *Agenda for 2000 A.D. — Need for Systematic Anticipation*, National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (April 7-9, 1976) (conference commemorating Roscoe Pound's address to the American Bar Association's 1906 annual meeting), reprinted in 70 F.R.D. 79, 91 (1976).

The United States Court of Appeals for the Seventh Circuit expressed a similar view in *Badillo v. Central Steel & Wire Co.*⁴⁹ The court asserted that there was an absence of subjective bad faith on the part of an attorney which prevented sanctions, even though his client contradicted every material allegation by testimony at a deposition.⁵⁰ It was clear that by the early 1980's, Rule 11, once described as "the most famous and widely applicable binding precept regulating lawyer honesty in pleading,"⁵¹ had failed miserably in deterring abusive and dilatory tactics.⁵²

III. AMENDED RULE 11: AN ELEMENTAL APPROACH AND ANALYSIS

A. *An Overview of the Rule*

Rule 11 was amended, effective August 1, 1983.⁵³ Embodied in the amended Rule is a stringent prohibition against frivolous litigation. In contrast with the original Rule, new Rule 11 attempts to put forth objective criteria to determine "frivolousness,"⁵⁴ an elusive term, which may be "more readily recognized than cogently defined."⁵⁵ The amended rule requires attorneys to make a reasonable inquiry into the factual and legal basis for every pleading, motion and other paper filed.⁵⁶ This new objective test of reasonableness has replaced the former test of subjective bad faith. Additionally, current Rule 11 impacts on pleadings filed for "any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."⁵⁷ A violation of any one of the affirmative

49. 717 F.2d 1160 (7th Cir. 1983).

50. *Id.* at 1162.

51. Risinger, *supra* note 19, at 4-5.

52. FED. R. CIV. P. 11 advisory committee note, 97 F.R.D. 165, 198 (1983). Judge Schwarzer has expressly stated that "[w]idespread concern over frivolous litigation and abusive practices of attorneys" led to the 1983 amendments to Rule 11. Schwarzer, *supra* note 7, at 181.

53. See *supra* note 1. To understand the rapidly evolving law of sanctions it is necessary to go back to the 1980 amendments to the Federal Rules of Civil Procedure. See Amendments to the Federal Rules of Civil Procedure, 446 U.S. 997 (1980). At that time, three Justices of the Supreme Court dissented from their promulgation, not because the amendments were inherently objectionable, but because the dissenters believed that the proposed changes fell short of those needed to accomplish reforms in civil litigation that would address the twin problems of abuse of discovery and the cost of litigation. *Id.* at 997-98 (Powell, J., dissenting). Justice Powell was joined by Justice Stewart and Justice Rehnquist. *Id.*

54. Rule 11 contains two grounds for sanctions. The first ground is the "frivolousness clause." *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 830 (9th Cir. 1986).

55. Hermann, *Frivolous Criminal Appeals*, 47 N.Y.U. L. REV. 701, 705 (1972) ("Frivolousness, like madness and obscenity, is more readily recognized than cogently defined.").

56. FED. R. CIV. P. 11. Amended Rule 11 applies to pleadings, motions and other papers, whereas the original Rule 11 only applied to pleadings; see *id.*

57. *Id.*

duties embodied in Rule 11 will result in *mandatory* sanctions on the attorney, the client or both.⁵⁸

Rule 11, as amended, emphasizes the role of an attorney as an officer of the court. It mandates that an attorney's duty to a client cannot be permitted to override his duty to the justice system.⁵⁹ Rule 11 intends "to reduce the reluctance of courts to impose sanctions"⁶⁰ by presenting judges with a more focused standard and an expanded role as active case managers.⁶¹

Rule 11 contains two prongs which provide for sanctions. The first prong is the "frivolousness" clause, otherwise known as the "well-founded" clause.⁶² This part of the Rule presents two issues: whether the party or attorney made a reasonable inquiry into the facts, and whether the party or attorney made a reasonable inquiry into the law.⁶³ A violation of either subpart of the frivolousness clause constitutes an infraction of Rule 11. The second prong, the "improper purpose" doctrine, requires that a pleading not be interposed for any improper purpose, and is placed in the conjunctive with the frivolousness clause.⁶⁴ Thus, a violation of the frivolousness clause *or* the improper purpose section will result in sanctions.

58. Rule 11 requires federal district judges to sanction those who file or pursue frivolous lawsuits. A similar rule exists to discourage frivolous appeals. See FED. R. APP. P. 38 ("If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."). A growing number of states have adopted rules similar to Rule 11. See, e.g., WIS. STAT. § 814.025 (1985-86); ARIZ. R. CIV. P. 11(a); KY. R. CIV. P. 11; MICH. CT. R. 2.114.

59. See *Lepucki v. Van Wormer*, 765 F.2d 86, 87 (7th Cir.), cert. denied, 474 U.S. 827, damages awarded, 474 U.S. 992 (1985); *In re Ronco, Inc.*, 105 F.R.D. 493, 497 (N.D. Ill. 1985), vacated, 838 F.2d 212 (7th Cir. 1988); see also Salomon, *Should There Be Limits on Lawyer Zeal?*, Nat'l L.J., July 21, 1986, at 17, col. 1.

60. See FED. R. CIV. P. 11 advisory committee notes (amended Rule 11 "intended to reduce the reluctance of courts to impose sanctions"); A. MILLER, *supra* note 2; Miller & Culp, *Litigation Costs, Delay Prompted the New Rules of Civil Procedure*, Nat'l L.J., Nov. 28, 1983, at 24, col. 1.

61. The concept of judges as case managers is generally accepted today. See generally Oliphant, *Rule 11 Sanctions and Standards: Blunting the Judicial Sword*, 12 WM. MITCHELL L. REV. 731, 743 (1986) ("Even attorneys who see themselves as vigilant guardians of every aspect of a client's case, no longer oppose stronger judicial involvement in the pretrial area."). See also Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770 (1981); Resnick, *Managerial Judges*, 96 HARV. L. REV. 376 (1982).

62. See *supra* note 54; see also Note, *Risky Business: The Nuts and Bolts of Amended Rule 11(a)*, Boone v. Superior Court, 145 Ariz. 235, 700 P.2d 1335 (1985), 19 ARIZ. ST. L.J. 145, 152 (1987).

63. See *Brown v. Federation of State Medical Bds.*, 830 F.2d 1429, 1435 (7th Cir. 1987).

64. See *Ronco*, 105 F.R.D. at 495.

B. The Frivolousness Clause

1. Reasonable Inquiry Into Fact

The frivolousness clause of Rule 11 demands that an attorney certify, based on "the best of his knowledge, information, and belief formed after reasonable inquiry [that the pleading] is well grounded in fact."⁶⁵ This qualification refines the former necessity that there be "good ground to support" a paper filed with the court.⁶⁶ This new affirmative duty, that the attorney investigate the facts, was not explicit under the old Rule or the cases interpreting it.⁶⁷ Under this provision the facts need not be undisputed or indisputable, but they must be sufficiently substantial to support a reasonable belief in the existence of a factual basis for the paper.⁶⁸

The requisite factual inquiry can be obtained through personal interviews with the client and key witnesses as well as review of all relevant documents.⁶⁹ It is not permissible to file suit and use discovery as the sole means of determining whether a client has a valid claim⁷⁰ when a reasonable independent investigation of available information could support or dismiss the factual basis. A mere hunch that a client may have a cause of action is no longer enough to justify the filing of a complaint. An attorney must have some reasonably reliable information that a claim exists.⁷¹ Yet despite the affirmative investigative burden placed on the attorney, Rule 11 is not designed to require perfect knowledge of a potential claim, particularly if the facts are presumptively under the control of the opposing party.⁷²

The reasonableness of an attorney's belief should be tested in light of the circumstances "at the time the pleading, motion, or other paper was sub-

65. FED. R. CIV. P. 11.

66. See *supra* note 24.

67. 5 C. WRIGHT & A. MILLER, *supra* note 29, at 499-500 ("[t]he cases [under the former rule] do not make it clear to what extent an attorney must investigate his client's case prior to signing").

68. See Schwarzer, *supra* note 7, at 187; see also *Wold v. Minerals Eng'g Co.*, 575 F. Supp. 166, 167 (D. Colo. 1983).

69. See *Wold*, 575 F. Supp. at 167; see also *Florida Monument Builders v. All Faiths Memorial Gardens*, 605 F. Supp. 1324, 1326 (S.D. Fla. 1984).

70. *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1083 (7th Cir. 1987).

71. Rothschild, *Rule 11: Stop, Think, and Investigate*, 11 LITIGATION 13, 15 (Winter 1985); see also *Fleming Sales Co., Inc. v. Bailey*, 611 F. Supp. 507, 519 (N.D. Ill. 1985) (lawyers have a broad responsibility to probe the client about the facts).

72. See, e.g., *Kamen v. American Tel. & Tel. Co.*, 791 F.2d 1006, 1012 (2d Cir. 1986) (court considers reasonableness of inquiry in light of fact that relevant information was largely in control of defendant).

mitted.”⁷³ The drafters of Rule 11 foresaw that the reasonableness of an inquiry into facts would depend on the individual case. Thus, factors which a federal district court should consider in evaluating a reasonable inquiry include: the complexity of the facts;⁷⁴ whether the case was accepted from another attorney;⁷⁵ the lawyer’s expertise in the field;⁷⁶ whether the attorney had substantial access to research facilities;⁷⁷ and whether the signer of the documents had sufficient time for investigation.⁷⁸ Furthermore, an attorney should consider the reliability of the facts furnished by the client and explore the source, since “unverified hearsay based on rumor”⁷⁹ has been sanctioned.

One example of failure to make a reasonable inquiry into the facts occurred in *Viola Sportswear, Inc. v. Mimun*.⁸⁰ In *Viola*, the plaintiff alleged a nationwide trade conspiracy based on the sale of a single pair of counterfeit designer jeans for ten dollars.⁸¹ The court found that the plaintiff made no investigation of the facts before filing its complaint and imposed sanctions under Rule 11 on the plaintiff and its attorneys in the amount of \$20,000.⁸² Clearly, the attorneys failed their “stop-and-think obligation”⁸³ under Rule 11.

2. Reasonable Inquiry Into Law

In addition to the requirement of a reasonable inquiry into fact, pleadings and briefs must be “warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.”⁸⁴ Rule 11 is

73. FED. R. CIV. P. 11 advisory committee notes. The court “is expected to avoid using the wisdom of hindsight . . .” *Id.*

74. See *Brown*, 830 F.2d at 1435; *R.K. Harp Inv. Corp. v. McQuade*, 825 F.2d 1101, 1103-04 (7th Cir. 1987); *Thomas v. Capital Sec. Serv. Inc.*, 812 F.2d 984, 988 (5th Cir. 1987).

75. FED. R. CIV. P. 11 advisory committee notes.

76. Schwarzer, *supra* note 7, at 194.

77. *Id.* See, e.g., *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 103 F.R.D. 124, 129 (N.D. Cal. 1984) (Schwarzer, J.) (noting counsel’s access to Lexis), *rev’d*, 801 F.2d 1531 (9th Cir. 1986).

78. *Brown*, 830 F.2d at 1435.

79. *Miller v. Schweickart*, 413 F. Supp. 1059, 1061 (S.D.N.Y. 1976).

80. 574 F. Supp. 619 (E.D.N.Y. 1983).

81. *Id.* at 621. The plaintiff filed suit approximately eight days after the pair of jeans had been purchased; that single sale was the basis for the alleged nationwide conspiracy. *Id.*

82. *Id.*

83. A. MILLER, *supra* note 2, at 15; accord *Stewart v. RCA Corp.*, 790 F.2d 624, 633 (7th Cir. 1986) (“Rule 11 requires attorneys to think first and file later”); *In re TCI Ltd.*, 769 F.2d 441, 442 (7th Cir. 1985); *Duncan v. WJLA-TV, Inc.*, 106 F.R.D. 4, 5-6 (D.D.C. 1984); see also Rothschild, *supra* note 71, at 13.

84. FED. R. CIV. P. 11. See *Zaldivar*, 780 F.2d at 831 (stating that “good faith belief in the merit of a legal argument is an objective condition which a competent attorney attains only after reasonable inquiry”); *Weir v. Lehman Newspapers, Inc.*, 105 F.R.D. 574, 576 (D. Colo. 1985)

clearly not intended to discourage lawyers from proffering innovative arguments. Nevertheless, there are limits. Counsel who place an unreasonable burden of study and illumination on opposing counsel should expect to pay the consequences — sanctions under Rule 11.⁸⁵ An advocate must represent his or her client within the existing structure of the law, and not some imagined version of it.⁸⁶

Inadequate legal analysis on the part of an attorney is particularly fatal under Rule 11. In fact, courts seem to possess a greater willingness to impose sanctions for legally frivolous claims than for those claims evidencing a failure of factual inquiry.⁸⁷

If a claim is *highly* implausible, then an attorney must refrain from filing in order to avoid sanctions. For example, in *Blair v. Shenandoah Women's Center, Inc.*,⁸⁸ the plaintiff sued a battered women's shelter which had provided plaintiff's wife protection from him. The plaintiff alleged sex discrimination, conspiracy, defamation, and harassment, and sought ten million dollars in damages.⁸⁹ The court dismissed the case and awarded attorneys' fees.⁹⁰ Claims such as this one, which are devoid of any colorable legal basis will be abrogated and sanctioned appropriately. However, the legal basis of most claims is not easy to evaluate.⁹¹

Almost every new claim presents a novel question of law which varies to some extent from existing law. Thus, it is imperative that a reasonably competent attorney analyze precedent, evaluate evidence, and understand basic legal principles.⁹² A presumption has evolved in various federal circuits that if an attorney argues a legal theory purported to follow "existing law" without citing directly adverse controlling authority, Rule 11 has been violated.⁹³

(holding that "[i]f there is no objective basis for an attorney's belief that his client's claims are warranted by . . . law . . . then sanctions should be imposed").

85. *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir. 1986).

86. *Id.*

87. S. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 34 (Federal Judicial Center 1985).

88. 757 F.2d 1435 (4th Cir. 1985).

89. *Id.* at 1435.

90. *Id.*

91. Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 638 (1987).

92. See *McLaughlin v. Western Cas. & Sur. Co.*, 603 F. Supp. 978 (S.D. Ala. 1985) (counsel sanctioned for ignoring a "hornbook" rule of law with intent to delay proceedings); see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 comment (1983).

93. See, e.g., *Jorgenson v. County of Volusia*, 625 F. Supp. 1543, 1547-48 (M.D. Fla. 1986) (Rule 11 sanctions imposed because attorney ignored precedent and relied instead on an inapplicable case to present a misleading standard to the court); *Cameron v. Internal Revenue Serv.*, 593 F.

However, the Ninth Circuit Court of Appeals in *Golden Eagle Distributing Corp. v. Burroughs Corp.*,⁹⁴ held that failure to cite adverse authority was not a valid ground for Rule 11 sanctions.⁹⁵ The district court in *Golden Eagle* sanctioned the defendant's attorneys for completely ignoring directly adverse authority in their motion for summary judgment.⁹⁶ The court of appeals maintained that if Rule 11 was expanded that far, "mandatory sanctions would ride on close decisions concerning whether or not one case is or is not the same as another."⁹⁷ Though the court acknowledged that a lawyer should be sanctioned under Rule 11 for exhibiting "real or feigned ignorance of authorities which render his argument meritless,"⁹⁸ it declined to sanction attorneys who had done just that.

Sanctions are to be reserved for those theories that a reasonably competent attorney⁹⁹ would deem frivolous.¹⁰⁰ An attorney either has to have a reasonable belief that a paper is "warranted by existing law"¹⁰¹ or that a good faith argument can be made "for the extension, modification, or reversal of existing law."¹⁰² In order to determine if either of these legal argu-

Supp. 1540, 1557 (N.D. Ind. 1984) (Rule 11 sanctions imposed for litigating in the face of controlling precedents that removed any colorable basis in law for the claim).

94. 801 F.2d 1531 (9th Cir. 1986).

95. *Id.* at 1542. The court also concluded that Rule 11 does not require that counsel correctly differentiate between whether their position is warranted by existing law or is a good faith argument for modification, extension, or reversal of existing law. It simply requires that the motion be either one or the other. *Id.* at 1539.

96. 103 F.R.D. 124, 129 (N.D. Cal. 1984).

97. *Golden Eagle*, 801 F.2d at 1542.

98. *Id.*

99. The "reasonable man" against which conduct is tested is a competent attorney admitted to practice before the district court. *Zaldivar*, 780 F.2d at 830.

100. The following cases are actual examples that have plagued the judicial system:

- a grocer's suit against a patron for eating a grape in his supermarket without paying for it;
- a patient's suit against his dentist for \$85.63 in compensation after being forced to wait one hour forty-seven minutes for his appointment;
- an attorney's suit against Jimmy the Groundhog for mistakenly forecasting an early spring;
- a fan's suit against the [Green Bay Packers] for misrepresenting itself as a professional football team;
- a \$10 million federal class action suit against professional baseball on behalf of all fans allegedly injured by the 1982 baseball strike;
- a suitor's action against a young woman for the price of flowers and a theater ticket after she cancelled her promise to date him;
- an inmate's nuisance suit on the grounds that a newly installed toilet seat was too cold;
- another inmate's nuisance suit that he had lost friends because his brand of deodorant was no longer carried by the prison commissary.

W. FREEDMAN, FRIVOLOUS LAWSUITS AND FRIVOLOUS DEFENSES 4 (1987) (quoting Hurley, *Much Ado About Nothing: An Epidemic of Frivolous Law Suits Is Turning Our Legal System into the Courtroom of the Assured*, 17 DOCKET CALL 14, 14-17 (Summer 1982)) (emphasis added).

101. FED. R. CIV. P. 11.

102. *Id.*

ments is sufficiently plausible under amended Rule 11, an objective standard analyzing the facts and circumstances of the case is utilized.¹⁰³ This standard is more stringent than the original good-faith formula, and thus it is expected that a greater range of circumstances will trigger a Rule 11 violation.¹⁰⁴ Moreover, the drafters of Rule 11 deleted willfulness as a prerequisite to disciplinary action. This omission was intended to reduce the reluctance of courts to impose sanctions.¹⁰⁵

Under this legal inquiry strand of Rule 11, a good faith argument advocating a change in the law is not found simply in the absence of subjective bad faith.¹⁰⁶ Rather, good faith is objectively established by performing a reasonable inquiry into the law and revealing a logical basis to believe that

103. See *Brown*, 830 F.2d at 1435; *Kurkowski v. Volcker*, 819 F.2d 201, 204 (8th Cir. 1987); *Robinson v. National Cash Register, Co.*, 808 F.2d 1119, 1127 (5th Cir. 1987); *Dreis & Krump Mfg. v. International Ass'n of Machinists*, 802 F.2d 247, 255 (7th Cir. 1986); *Brown v. National Bd. of Medical Examiners*, 800 F.2d 168, 171 (7th Cir. 1986); *Zaldivar*, 780 F.2d at 830-31.

104. FED. R. CIV. P. 11 advisory committee notes; see also *Nemeroff v. Abelson*, 620 F.2d 339 (2d Cir. 1980).

105. The 1983 amendment deleted the term "willful" from the original version of Rule 11, thereby doing away with the original rule's subjective bad faith standard. *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 253 (2d Cir. 1985) (original Rule clearly required subjective bad faith, and the amended Rule 11 does not); FED. R. CIV. P. 11 advisory committee notes. "The reference in the former text to willfulness as a prerequisite to disciplinary action has been deleted." *Id.* See *Michigan Nat'l Bank v. Kroger Co.*, 619 F. Supp. 1149, 1154 (E.D. Mich. 1985) (standard for imposing sanctions under original Rule 11 was whether the action was taken in good faith).

In the first major decision evaluating the amended Rule, the United States Court of Appeals for the Second Circuit interpreted the rejection of the willfulness standard of old Rule 11 by saying, "Simply put, subjective good faith no longer provides the safe harbor it once did." *Eastway Constr. Corp.*, 762 F.2d at 253; see also *Nemeroff*, 620 F.2d at 350. ("[Original] Rule 11 speaks in plainly subjective terms"); accord *Lieb v. Topstone Indus.*, 788 F.2d 151, 157 (3d Cir. 1986) (amended Rule 11 is designed to discourage groundless filings, even if not filed in subjective bad faith); *Badillo v. Central Steel & Wire Co.*, 717 F.2d 1160, 1167 (7th Cir. 1983) (proper test under original Rule 11 is whether conduct was taken in subjective bad faith); *Fisher Bros. v. Cambridge-Lee Indus., Inc.*, 585 F. Supp. 69, 71 (E.D. Pa. 1983) (original Rule 11 required an attorney to act in subjective good faith regardless of the objective merit of the filing); see also *Pudlo v. Director, Internal Revenue Serv.*, 587 F. Supp. 1010, 1011 (N.D. Ill. 1984).

The term "willful" is defined in BLACK'S LAW DICTIONARY 1434 (5th ed. 1979) as "[p]roceeding from a conscious motive of the will; voluntary. Intending the result which actually comes to pass; designed; intentional; not accidental or involuntary. . . . Premeditated; malicious; done with evil intent, or with a bad motive or purpose, or with indifference to the natural consequences; unlawful, without legal justification." *Id.* See generally Mallor, *Punitive Attorneys' Fees for Abuses of the Judicial System*, 61 N.C.L. REV. 613 (1983) (due to infrequent use, most sanction powers are ineffective deterrents).

106. See *Zaldivar*, 780 F.2d at 831. "A good faith belief in the merit of a legal argument is an objective condition which a competent attorney attains only after reasonable inquiry." *Id.* But cf. Note, *supra* note 25, at 766-67. "In both the wording of Rule 11 and in the Advisory Committee Note, [an] ambiguous term such as "good faith argument" . . . impl[ies] a subjective standard." *Id.*

existing precedent should be changed.¹⁰⁷ Attorneys should not be penalized for waging uphill battles,¹⁰⁸ but good faith does insist that there be some realistic possibility that the claim will succeed.¹⁰⁹

C. *Improper Purpose Clause*

As the preceding discussion shows, the first prong of Rule 11, the frivolousness clause, is directed at the merits of frivolous papers. The second prong, the improper purpose clause, is aimed at papers which, though not necessarily frivolous,¹¹⁰ are found to be interposed for any improper purpose. This aspect of Rule 11 attempts to address the problem of misusing judicial procedures as a weapon for personal or economic harassment.¹¹¹ The improper purpose clause is not limited to papers filed in bad faith. In fact, the text of the amended rule itself does not refer to bad faith.¹¹² Rather, the rule conditions the imposition of sanctions on a finding of "any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."¹¹³ Whereas the original Rule listed only "delay" as an improper purpose,¹¹⁴ the new rule recognizes other improper purposes. Rule 11 now explicitly refers to harassment and unnecessary increase in litigation costs in addition to delay, and further implies that courts may find still other improper purposes.¹¹⁵

107. See *Blake v. National Cas. Co.*, 607 F. Supp. 189, 192 (C.D. Cal. 1984) (Rule 11 permits attorneys to challenge precedent and advance novel theories of law, but at some point, such legal arguments become frivolous).

108. *Fleming Sales*, 611 F. Supp. at 519.

109. See *id.*

110. "Frivolous is of the same order of magnitude as less than a scintilla." *Eastway Constr. Corp. v. City of New York*, 637 F. Supp. 558, 565 (E.D.N.Y. 1986). BLACK'S LAW DICTIONARY 601 (5th ed. 1979), defines frivolous as "[o]f little weight or importance. A pleading is 'frivolous' when it is clearly insufficient on its face . . . and is presumably interposed for mere purposes of delay or to embarrass the opponent." *Id.*

111. *Zaldivar*, 780 F.2d at 830; see also *WSB Elec. Co. v. Rank & File*, 103 F.R.D. 417, 421 (N.D. Cal. 1984) (finding the plaintiff's claims groundless in fact and legally unwarranted and concluding that the employer's purpose of advancing economic or political objectives through the courts was improper); *Lepucki*, 587 F. Supp. at 1395 (imposing sanctions and concluding that "it is patently obvious that this action was instituted not for the good faith reparation of an actual wrong but, rather, as a device for asserting certain philosophical beliefs").

112. See FED. R. CIV. P. 11 advisory committee notes. "The reference . . . to willfulness as a prerequisite to disciplinary action has been deleted." *Id.*

113. FED. R. CIV. P. 11.

114. For text of original Rule 11, see *supra* note 24.

115. For text of amended Rule 11, see *supra* note 1.

A preliminary draft of amended Rule 11 required that a pleading not be "primarily interposed" for an improper purpose.¹¹⁶ The drafter explained that the word "primarily" was ultimately removed in the final version to eliminate any ambiguity in the Rule.¹¹⁷ However, in the opinion of some commentators, the drafters' inclusion in the improper purpose clause of terms such as "unnecessary delay and needless cost" is inherently ambiguous in and of itself,¹¹⁸ and the standards by which improper purpose is to be judged are confusing.¹¹⁹ While the majority of the circuits have reasoned that an improper purpose is to be tested by objective standards,¹²⁰ some courts have interpreted the improper purpose language as synonymous with bad faith.¹²¹

D. Mandatory Sanctions

The original Rule 11 *permitted* a court to impose sanctions for infractions, whereas Rule 11, as amended, *requires* a court to impose sanctions.¹²² Thus, once a violation of any of the certification requirements is found, Rule 11 makes sanctions mandatory. The court does not have discretion, as it does under other rules and statutes,¹²³ to conclude that sanctions are unwarranted and to deny them.

The mandatory language is designed to reduce the courts' historical reluctance to levy sanctions. Although nearly every major lawsuit now includes at least the threat of a Rule 11 motion,¹²⁴ sanctions are being imposed mostly in civil rights, employment discrimination and public inter-

116. See *Report of the Judicial Conference Committee on Rules of Practice and Procedure*, app. C (March 9, 1982) (comments of Chairman Mansfield), reprinted in 97 F.R.D. 190, 191 (1983).

117. *Id.*

118. See *Zaldivar*, 780 F.2d at 831 n.9; Note, *supra* note 25, at 762; Note, *supra* note 29, at 142.

119. See *Zaldivar*, 780 F.2d at 831-32.

120. The view is nearly unanimous that an improper purpose is to be tested by objective standards. *Eastway Constr. Corp.*, 762 F.2d at 253. *Accord Brown*, 830 F.2d at 1436; *Thomas*, 812 F.2d at 988; *Zaldivar*, 780 F.2d at 831.

121. See, e.g., *McLaughlin*, 105 F.R.D. at 626 (improper motive in form of delay constituted bad faith); *McLaughlin v. Bradlee*, 602 F. Supp. 1412, 1417 n.6 (D.D.C. 1985) (improper purpose of harassment in instituting lawsuit and filing frivolous motions constitutes bad faith), *aff'd*, 803 F.2d 1197 (D.C. Cir. 1986). See also Joseph, *The Trouble With Rule 11 — Uncertain Standards and Mandatory Sanctions*, 73 A.B.A. J. 87, 88 (Aug. 1, 1987).

122. FED. R. CIV. P. 11 ("If a pleading, motion, or other paper is signed in violation of this rule, the court . . . shall impose . . . an appropriate sanction. . . ." (emphasis added)).

123. Under Rule 37 and 28 U.S.C. § 1927, a district court has discretion to award fees. See *supra* note 16.

124. See N.Y. Times, Oct. 2, 1986, at D8, col. 3.

est cases.¹²⁵ It has become apparent that since the inception of amended Rule 11, there has been a dramatic shift in judicial attitude toward the use of sanctions.¹²⁶ There is little doubt that for the most part the federal judiciary is now firmly resolved to use Rule 11 to discourage the issuance of frivolous claims.

1. Judicial Flexibility

Rule 11 makes sanctions mandatory, but it is within the court's discretion to select an appropriate sanction tailored to the particular facts of the case.¹²⁷ Though Rule 11 explicitly provides for an award of reasonable costs and attorneys' fees to be imposed on the transgressing party, some courts have gone beyond the express provision of Rule 11 and devised unique alternatives. For example, in *Heuttig & Schromm, Inc. v. Landscape Contractors Council*,¹²⁸ an employer brought a frivolous labor law claim against a local union.¹²⁹ Judge William W. Schwarzer, an avid proponent of Rule 11, based his decision to impose sanctions on the facts that the attorneys representing the employer held themselves out as experts in labor law and had brought the action for an improper purpose.¹³⁰ Besides ordering employer's counsel to pay sanctions of \$5,625 to the union, Judge Schwarzer demanded that the attorneys certify that no part of the sanctions would be charged to or paid by the employer. The judge further excoriated

125. See S. KASSIN, *supra* note 87, at 38 (judges who frequently imposed sanctions tended to impose them in a greater proportion of civil rights cases than did judges who used Rule 11 less vigorously); see also Rampacek, *The Impact of Rule 11 on Civil Rights Litigation*, 3 LAB. LAW. 93, 96 & n.17 (1987).

"So far, defense lawyers have sought Rule 11 sanctions by a 3-1 margin over plaintiffs' lawyers, according to Georgene Vairo, professor at Fordham University School of Law. Her research also indicates that the motions have been brought in a disproportionate number of civil rights cases." Marcotte, *supra* note 10, at 34.

126. See Rampacek, *supra* note 125, at 96-97.

127. "The court . . . retains the necessary flexibility to deal appropriately with violations of the rule. It has discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted." FED. R. CIV. P. 11 advisory committee notes.

128. 582 F. Supp. 1519 (N.D. Cal. 1984), *aff'd*, 790 F.2d 1421 (9th Cir. 1986).

129. *Id.* at 1522.

130. Judge Schwarzer commented on the employer's attorneys' conduct and experience: Counsel in this case are not newly admitted to the bar or engaged as general practitioners not well versed in labor law. The complaint is signed by a partner of the San Francisco firm of Littler, Mendelson, Fastiff & Tichy admitted to the bar for twelve years, and an associate of that firm seven years at the bar. . . . The Littler, Mendelson firm holds itself out as preeminent in labor law. Lawyers of that firm appear regularly and frequently in labor litigation in this Court. Given the claimed expertise and experience of these attorneys, a strong inference arises that their bringing of an action such as this was for an improper purpose.

Id.

the attorneys by ordering that a copy of his memorandum opinion be circulated to each partner and associate in the firm.¹³¹ In another case, Judge Schwarzer fashioned yet another type of sanction when he required an attorney to show cause why he should not be suspended from practice in front of the court for violation of Rule 11.¹³² Furthermore, some courts have even reasoned that in a particularly acute case of abuse, Rule 11 could be used by a court to compensate *itself* for time unnecessarily consumed by totally frivolous litigation.¹³³

2. Who May Be Sanctioned?

Rule 11 grants courts additional flexibility by providing that sanctions may be imposed on the attorney, the client or both. However, the advisory committee notes seem to encourage the courts to be cognizant of the pro se litigant's lack of legal experience in determining the specific sanction.¹³⁴ Consequently, courts have not imposed Rule 11 sanctions on pro se litigants absent a blatant case of harassing and vexatious litigation,¹³⁵ or "a complete disregard for the sanctity of judicial processes."¹³⁶

When imposing sanctions, the court must take into consideration the nature of the violation and the relative responsibility of the parties involved. If the Rule 11 infraction consists of a motion or other paper which is not supported by existing law, the sanction should be assessed against the attorney alone.¹³⁷ An attorney and the client, however, can be held jointly and

131. See *id.* at 1522-23; see also *Bockman v. Lucky Stores, Inc.*, 108 F.R.D. 296, 299 (E.D. Cal. 1985) (ordering copies of opinion given to every member of the sanctioned attorney's law firm).

132. See *Kendrick v. Zanides*, 609 F. Supp. 1162, 1173 (N.D. Cal. 1985).

133. See, e.g., *Storage Tech. Partners v. Storage Tech. Corp.*, 117 F.R.D. 675, 679 (D. Colo. 1987) ("nowhere stated in the text [of Rule 11] that an opposing party must be the recipient of the sanction imposed"); *Hearld v. Barnes & Spectrum Emergency Care*, 107 F.R.D. 17, 19-20 (E.D. Tex. 1985) (imposing \$5,000 fine payable to the court); *Dore v. Schultz*, 582 F. Supp. 154, 158 (S.D.N.Y. 1984) (imposing \$200 fine payable into court's registry).

134. "Although the standard is the same for unrepresented parties, who are obliged themselves to sign the pleadings, the court has sufficient discretion to take account of the special circumstances that often arise in pro se situations." FED. R. CIV. P. 11 advisory committee notes. See, e.g., *Cavallary v. Lakewood Sky Diving Center*, 623 F. Supp. 242, 246 (S.D.N.Y. 1985) (court would not sanction pro se plaintiff who lacked training to perceive legal inadequacies, but plaintiff here had been told by the previous court that his case was groundless); *Blume v. Leake*, 618 F. Supp. 95, 97 (D. Idaho 1985) (pro se litigant given benefit of the doubt); *Heimbaugh v. City of San Francisco*, 591 F. Supp. 1573, 1577 (N.D. Cal. 1984) (court noted that pro se litigant had limited legal experience and limited sanction to \$50). But see *Bacon v. AFSCME Council 13*, 795 F.2d 33, 34-35 (7th Cir. 1986); *Tarkowski v. County of Lake*, 775 F.2d 173, 176 (7th Cir. 1985).

135. *Taylor v. Prudential-Bache Sec., Inc.*, 594 F. Supp. 226, 227 (N.D.N.Y. 1984), *appeal dismissed mem.*, 751 F.2d 371 (2d Cir. 1984).

136. Note, *supra* note 12, at 353.

137. See *Blake*, 607 F. Supp. at 193; *Wold*, 575 F. Supp. at 167-68.

severally liable if the Rule 11 violation reflects a "deliberate litigation strategy."¹³⁸ This joint and several liability assures that the party burdened by the filing is reimbursed for its costs.¹³⁹

3. Procedural Aspects

Under Rule 11, the court may impose sanctions either on its own initiative¹⁴⁰ or upon the motion of the aggrieved party, by authorizing a sua sponte imposition of sanctions. Amended Rule 11 makes clear that so long as a violation is apparent to the court, sanctions are mandatory even in the absence of a motion by the opposing party. This concept of judicial enforcement is to be applied with vigor, yet exercised with caution.

Caution should also be exercised when a motion by a party is involved. Courts must be wary not to encourage attorneys to move for sanctions every time a motion is denied, a pleading is struck, or summary judgment is granted.¹⁴¹ A motion for sanctions under Rule 11 should not be made casually, as it could reflect on an attorney's record or perhaps injure his professional reputation,¹⁴² regardless of the motion outcome. Accordingly, courts should reserve sanctions only for clearly frivolous claims¹⁴³ or conduct which is so blatant and egregious that it merits such an assessment.

"A party seeking sanctions should give notice to the court and the offending party promptly upon discovering the basis for doing so."¹⁴⁴ Following that, a party seeking sanctions must make the requisite reasonable inquiry that the rule requires for all motions because Rule 11 motions, themselves, are subject to possible sanctions.¹⁴⁵

Although Rule 11 does not address the issue of procedural rights of attorneys and clients who are being sanctioned, the advisory committee

138. See *Kendrick*, 609 F. Supp. at 1173 (both attorney and client liable for filing frivolous claims).

139. The potential for clients to be sanctioned may create conflict within the attorney-client relationship. See *Eastway Constr. Corp.*, 637 F. Supp. at 570. "[T]he effect on attorney-client privilege and trust, may be devastating." *Id.* "A similar problem may arise between out-of-town and local counsel." Schwarzer, *supra* note 7, at 199.

140. "Courts currently appear to believe they may impose sanctions on their own motion." FED. R. CIV. P. 11 advisory committee notes.

141. See *Marco Holding Co. v. Lear Siegler, Inc.*, 606 F. Supp. 204, 215 (N.D. Ill. 1985).

142. See *Rothschild*, *supra* note 71, at 15.

143. See, e.g., *Bradlee*, 803 F.2d at 1197 (plaintiff was sanctioned more than \$12,900 for his seven-year escapade in both state and federal courts); *Thiel v. First Fed. Sav. & Loan Ass'n*, 646 F. Supp. 592 (N.D. Ind. 1986) (plaintiffs refused to abandon action after being warned by the court).

144. See FED. R. CIV. P. 11 advisory committee notes.

145. See *Miller v. Affiliated Fin. Corp.*, 600 F. Supp. 987, 991 (N.D. Ill. 1984) (ancillary proceedings are subject to Rule 11).

notes contain conflicting statements about procedural rights of due process.¹⁴⁶ While the committee notes comment that “[t]he procedure obviously must comport with due process requirements,”¹⁴⁷ they also suggest that “procedural safeguards should be kept to a minimum.”¹⁴⁸ Courts have thus held that notice and an opportunity to be heard on the record, in addition to the filing of the motion, are sufficient to comport with due process requirements.¹⁴⁹ In the usual case, sanction proceedings are limited to the record;¹⁵⁰ discovery or a full-blown evidentiary hearing are allowed only under extraordinary circumstances.¹⁵¹ Any expanded procedural approach would defeat the goals of Rule 11 to promote judicial economy and deter the filing of future frivolous actions.¹⁵²

IV. THE SEVENTH CIRCUIT APPROACH

A. *Confusion at the Outset*

Presently, all the federal circuit courts of appeals maintain that the appropriate standard for the imposition of sanctions under Rule 11 is an objective one.¹⁵³ However, the United States Court of Appeals for the

146. FED. R. CIV. P. 11 advisory committee notes.

147. *Id.*

148. *Eastway Constr. Corp.*, 637 F. Supp. at 568.

149. See, e.g., *Cannon v. Loyola Univ. of Chicago*, 609 F. Supp. 1010, 1017 (N.D. Ill. 1985) (allowing plaintiff to respond to Rule 11 request is sufficient opportunity to be heard), *aff'd*, 784 F.2d 777 (7th Cir. 1986); *Rodgers v. Lincoln Towing Serv., Inc.*, 596 F. Supp. 13, 27-28 (N.D. Ill. 1984) (“[i]t would be of no value to hold a hearing at which plaintiff’s attorneys could explain to me why they felt it necessary to festoon their complaint with frivolous claims”), *aff’d*, 771 F.2d 194 (7th Cir. 1985); *Dore*, 582 F. Supp. at 158 (sanctions imposed sua sponte without hearing); cf. *Kendrick*, 609 F. Supp. at 1162. In *Kendrick*, the court ordered a hearing prior to awarding fees. However, the hearing appeared to have been scheduled primarily for purposes of allowing the responding attorneys to show cause why they should not be suspended from practicing in the California federal courts, not for purposes of considering the opposing counsel’s fee application. *Id.* at 1173. See also *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (due process requires, at a minimum, a notice and an opportunity to be heard, “appropriate to the nature of the case”).

150. See Schwarzer, *supra* note 7, at 198; see also *Thomas*, 812 F.2d at 989.

151. Note, *The Dynamics of Rule 11: Preventing Frivolous Litigation By Demanding Professional Responsibility*, 61 N.Y.U. L. REV. 300, 328 (1986).

152. See *Westmoreland v. CBS, Inc.*, 770 F.2d 1168 (D.C. Cir. 1985). The court on remand was urged to consider that the costs of sanction litigation could exceed the efficiencies sought by the federal rules, and that the scope of its sanction proceedings should therefore be limited. *Id.* at 1179.

153. See *Stites v. Internal Revenue Serv.*, 793 F.2d 618, 620 (5th Cir. 1986) (“in addition to a subjective, good faith belief that the pleading is well founded in both fact and law Fed. R. Civ. P. 11 now requires that the belief be objectively reasonable”); *Stevens v. Lawyers Mut. Liab. Ins. Co. of N.C.*, 789 F.2d 1056, 1060 (4th Cir. 1986) (“a court must judge the attorney’s conduct under an objective standard of reasonableness rather than by assessing subjective intent”); *Lieb v. Topstone Indus., Inc.*, 788 F.2d 151, 157 (3d Cir. 1986) (same); *Zalvidar v. City of Los Angeles*, 780 F.2d 823, 829 (9th Cir. 1986) (subjective bad faith is not an element to be proved under present Rule

Seventh Circuit initially failed to clearly adopt the objective standard and, as a result, caused confusion for its district courts.

The confusion was created by the decision in *Suslick v. Rothschild Securities Corp.*,¹⁵⁴ in which the Seventh Circuit reversed a district court's order granting Rule 11 attorneys' fees to the defendant.¹⁵⁵ The court of appeals' basis for its decision included factors that the plaintiff's complaint involved a complex area of the law, the claim was at least colorable, and the attorney's action did not exhibit (subjective) bad faith.¹⁵⁶ At first glance, application of the subjective bad faith standard in *Suslick* seemed fundamentally fair and accurate because although the case was decided after August 1, 1983,¹⁵⁷ the court considered conduct occurring before the amendment to Rule 11. However, confusion was created when the Seventh Circuit Court of Appeals quoted amended Rule 11 in its entirety and then stated that amended Rule 11 "requires a finding of subjective bad faith"¹⁵⁸ Though perhaps mistaken dictum, the *Suslick* decision nonetheless obfuscated the issue in the courts of the Seventh Circuit.

For example, in *Davis v. United States*,¹⁵⁹ the United States District Court for the Northern District of Illinois denied defendant's motion for attorneys' fees because the defendant had failed to show that the plaintiff acted in subjective bad faith.¹⁶⁰ In concluding that subjective bad faith was still the test, the court noted that such a standard appeared inconsistent with the purpose of the 1983 amendments, but then stated "it is clear that *Suslick* itself was interpreting the amended version of Rule 11 . . . and this court is bound by that interpretation."¹⁶¹ The same district court, in *Ba-*

11); *Confederacion Laborista de Puerto Rico v. Cervecería India, Inc.*, 778 F.2d 65, 66 (1st Cir. 1985) (same); *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535, 540 (3d Cir. 1985) ("subjective bad faith is no longer a predicate to a Rule 11 violation; the test is now an objective one of reasonableness"); *Indianapolis Colts v. Mayor of Baltimore*, 775 F.2d 177, 181 (7th Cir. 1985); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1177 (D.C. Cir. 1985); *Moore v. City of Des Moines*, 766 F.2d 343, 346 (8th Cir. 1985); *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 253-54 (2d Cir. 1985); *Maier v. Orr*, 758 F.2d 1578, 1584 (Fed. Cir. 1985).

154. 741 F.2d 1000 (7th Cir. 1984).

155. *Id.* at 1006-07. The court relied on Rule 11 and 28 U.S.C. § 1927 and asserted that both required a showing of bad faith. *Id.* See *supra* note 16 for text of 28 U.S.C. § 1927.

156. *Suslick*, 741 F.2d at 1006.

157. See *supra* text accompanying note 53.

158. *Suslick*, 741 F.2d at 1007 (emphasis added).

159. 104 F.R.D. 509 (N.D. Ill. 1985).

160. *Id.* at 512; see also ABA, LITIGATION SECTION, SANCTIONS: RULE 11 AND OTHER POWERS 73 (C. Schaffer, Jr. ed. 1986) (the District Court for the Northern District of Indiana applied the "subjective bad faith" test in a series of tax appeals).

161. *Davis*, 104 F.R.D. at 512 n.2.

ranski v. Serhant,¹⁶² again expressed doubt as to *Suslick*, commenting that the "holding [was] open to question."¹⁶³

Finally, in the case of *In re Ronco, Inc.*,¹⁶⁴ the same district court assumed the ultimate responsibility and cleared the "somewhat muddled water" of the Seventh Circuit, holding that the objective standard applies to Rule 11 motions.¹⁶⁵ Analyzing amended Rule 11 and the advisory committee notes, the court determined "it is exceedingly plain a new *objective* test of reasonableness has taken the place of Rule 11's former *subjective* test of good faith."¹⁶⁶ The district court asserted that the *Suslick* court had mistakenly cited to the amended Rule and concluded therefore that the *Suslick* test was not binding.¹⁶⁷ Finally, the Seventh Circuit Court of Appeals straightened out its own tortuous path in subsequent decisions,¹⁶⁸ but with no mention of the *Ronco* analysis.¹⁶⁹

B. A Chilling Approach to Rule 11

After the United States Court of Appeals for the Seventh Circuit affirmatively adopted the objective test for Rule 11 determinations, it put forth a series of opinions which exhibited an arbitrary and capricious manner of application. As a result, Rule 11 has been transformed from a protector against frivolous litigation, designed to be utilized in only the most egre-

162. 106 F.R.D. 247, 250 n.3 (N.D. Ill. 1985).

163. *Id.*

164. 105 F.R.D. 493 (N.D. Ill. 1985), *vacated*, 838 F.2d 212 (7th Cir. 1988).

165. *Id.* at 497.

166. *Id.* at 495. Judge Schwarzer has rejected any kind of bad faith formulation:

To test compliance with the rule, as some courts have done, by reference to whether bad faith has been shown is inconsistent with its text and purpose. The Advisory Committee Notes point out that 'the standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation;' willfulness as a prerequisite to disciplinary action was deleted by the 1983 amendment which 'is intended to reduce the reluctance of courts to impose sanctions . . . by emphasizing the responsibilities of the attorney and reenforcing those obligations by the imposition of sanctions.' Reasonable belief that a paper is 'warranted by law' should therefore be treated as an objective standard turning on the facts and circumstances of the case, not on the attorney's state of mind.

Schwarzer, *supra* note 7, at 191 (citations omitted).

167. *Ronco*, 105 F.R.D. at 497.

168. See *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir. 1986); *Indianapolis Colts v. Mayor of Baltimore*, 775 F.2d 177, 181 (7th Cir. 1985); *Frazier v. Cast*, 771 F.2d 259, 265 n.4 (7th Cir. 1985); see also *Pawlowske v. Chrysler Corp.*, 623 F. Supp. 569, 572 n.4 (N.D. Ill. 1985) (objective standard followed); *Beck v. Cantor, Fitzgerald & Co.*, 621 F. Supp. 1547, 1566 (N.D. Ill. 1985) (same); *Sloan v. United States*, 621 F. Supp. 1072, 1075 (N.D. Ind. 1985) (same).

169. See, e.g., *Indianapolis Colts*, 775 F.2d at 181 (prior to the amendment, Rule 11 was incorporated as requiring a showing of subjective bad faith, however, the amended standard is one of reasonableness); *Frazier*, 771 F.2d at 263 (the standard is an objective one).

gious of circumstances, into an instigator of ancillary proceedings. This change, resulting from a new judicial attitude, does not bode well for litigators in the Seventh Circuit. Recent decisions reflect the whimsical manner in which sanctions under Rule 11 have been imposed.

In fact, a careful analysis of several Seventh Circuit opinions prompts legitimate concern for creative advocates, especially because mandatory sanctions now hinge upon dubious judicial decisions in borderline cases. Rule 11, as amended, was intended to achieve a modest step toward easing the congestion in the federal courts. It was not meant to require an attorney to forego recovery on a particular theory merely because he or she believes there is a strong chance of losing.¹⁷⁰ Nor was its purpose to force an attorney to balance his or her obligation of zealous advocacy to a client against the possibility of the imposition of sanctions. Moreover, it was not the drafters' desire to replace the atmosphere of friendly cooperation and professional collegiality existing between opposing attorneys in civil litigation with increased hostility in an already adversary atmosphere.¹⁷¹ Yet it is clear that by its arbitrary application of Rule 11, the Seventh Circuit has judicially expanded the Rule far beyond the original vision of the drafters. As a result, vigorous advocacy, a concept deeply embodied in the American legal system, is unnecessarily chilled.

1. *Rodgers v. Lincoln Towing Service, Inc.*: Reasonable Lawyers Could Differ

In *Rodgers v. Lincoln Towing Service, Inc.*,¹⁷² the Seventh Circuit affirmed the dismissal of a civil rights suit and the award of Rule 11 sanctions against plaintiff's attorneys for filing what the district court described as a "ponderous, extravagant, and overblown complaint."¹⁷³ The plaintiff sued under 42 U.S.C. § 1983 after police threatened him with a warrant for his arrest unless he appeared at the police station. They subsequently detained him overnight for ten and a half hours on a groundless charge without allowing him to post bail or call an attorney.¹⁷⁴ The plaintiff eventually stood trial and was found not guilty.¹⁷⁵

170. See *Weinstein v. University of Ill.*, 630 F. Supp. 635, 636 (N.D. Ill. 1986), *aff'd*, 811 F.2d 1091 (7th Cir. 1987).

171. See *Hot Locks, Inc. v. Ooh La La, Inc.*, 107 F.R.D. 751 (S.D.N.Y. 1985).

172. 596 F. Supp. 13 (N.D. Ill. 1984), *aff'd*, 771 F.2d 194 (7th Cir. 1985).

173. *Id.* at 22. In his amended complaint, Rodgers alleged that the police and a towing company had conspired to bring a false vandalism charge against him for throwing paint on a building, and that the city of Chicago maintained unconstitutional policies. *Id.* at 16-17.

174. *Id.* at 16.

175. *Id.*

Plaintiff's complaint charged constitutional violations under 42 U.S.C. § 1983, but the court dismissed the complaint and assessed sanctions under Rule 11 for legally unwarranted pleadings.¹⁷⁶ The court disagreed with the plaintiff's attorneys that several cases under section 1983¹⁷⁷ support his claim and found other case law controlling. It seems that plaintiff's attorneys were penalized, in part, because their view of the law opposed the line of reasoning employed by the court.

For example, the court found implausible the plaintiff's claim that the threat of arrest made the police officer's order to appear at the station an unconstitutional fourth amendment seizure.¹⁷⁸ However, *United States v. Mendenhall*,¹⁷⁹ the case cited by the court as support, held that using "a show of authority" to inhibit a person's movement *may* amount to a fourth amendment violation.¹⁸⁰ Even though the Seventh Circuit Court of Appeals described the threats of police and extended detention as more than a "relatively minor incident,"¹⁸¹ the court, in affirming, failed (as did the district court) to "reasonably inquire" into the law. Thus, in a situation where competent attorneys and judges had different, but plausible views of the law, sanctions were imposed.

2. *In re Kelly*: A Questionable Call

In the decision of *In re Kelly*,¹⁸² an attorney was ordered by the Seventh Circuit Court of Appeals to show cause why he should not be disciplined for violating Rule 11.¹⁸³ He was charged with a failure to make a reasonable factual inquiry before drafting a single statement in an affidavit filed in support of an accompanying motion.¹⁸⁴ Use of Rule 11 sanctions to penalize one questionable statement in an affidavit raises two obvious, interrelated concerns: first, whether this type of conduct was contemplated by the drafters of amended Rule 11 to be within the purview of Rule 11 sanctions;

176. *Id.* at 17-22. The total sanction was \$858.43. *Id.* at 28.

177. Attorneys for Rodgers cited two cases: *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), and *United States v. Black*, 675 F.2d 129 (7th Cir. 1982), *cert. denied*, 460 U.S. 1068 (1983) "which indicate that some of his claims could well have been found actionable under 42 U.S.C. § 1983." Snyder, *supra* note 12, at 17.

178. *Rodgers*, 596 F. Supp. at 18-19.

179. 446 U.S. 544 (1980); *see also* Note, *supra* note 91, at 639.

180. *Mendenhall*, 446 U.S. at 554-55.

181. *Rodgers*, 771 F.2d at 205-06 n.8. The Seventh Circuit Court of Appeals also noted that the imposed sanction of \$858.43 (one-third of the attorney fees) indicated the *possible merit* of some of Rodger's claims. *Id.* at 205. For a discussion of the issue that arises from this indication, *see infra* notes 181-93 and accompanying text.

182. 808 F.2d 549 (7th Cir. 1986).

183. *Id.* at 549.

184. *Id.* at 550.

and second, whether Rule 11 should apply to individual arguments in a paper filed with the court or should it apply only to the filing as a whole.

The Seventh Circuit classified counsel's statement as a "shot in the dark, a guess,"¹⁸⁵ and then proceeded to conclude that the statement expressed a positive fact.¹⁸⁶ Nowhere in the text of Rule 11 or the advisory committee notes is the rhetoric "positive fact" mentioned or envisioned. Irrespective of that fact, the court put forth an arbitrary, subjective concept of which litigators must now be wary. As a result of this creation, the court seems to place an excessive burden on attorneys practicing in the Seventh Circuit to initially decide whether an allegation of fact is an acceptable positive fact or an "extravagant inference"¹⁸⁷ in the eyes of the court. This stringent requirement serves only to broaden the scope of Rule 11 to envelop conduct *not* intended to be violative of Rule 11.

In addition, *In re Kelly* broaches another topic which has yet to be explicitly addressed by the Court of Appeals for the Seventh Circuit, but was considered by a Seventh Circuit district court in *Martinez, Inc. v. H. Landau & Co.*¹⁸⁸ In *Martinez*, the court held that Rule 11 was not intended to apply to particular arguments within the pleading, but rather applied to the motion as a whole.¹⁸⁹ Otherwise, the opinion cautioned, the Rule would "spawn litigation as potentially abusive as that which Rule 11 was designed to prevent."¹⁹⁰ The court further noted that under the contrary view of focusing on individual arguments, attorneys would be less apt to raise potentially meritorious issues, and worse yet, sanctions could be awarded against the party that prevailed. Despite the fact that this issue was visibly present in *Kelly*, the court omitted any such discussion.

185. *Id.* at 551.

186. The court stated:

A statement of positive fact is a representation not only that the fact is true as represented, but also that the person making the statement has a solid basis for making it. If someone asks you the time, you look at your watch (which you know doesn't work) and tell him it is 2:05, you are misleading him even if 2:05 is your best guess of what time it is. Even if the facts alleged in Mr. Kelly's affidavit are true, which they now appear not to be, the affidavit is an attestation that they are based on knowledge rather than reckless surmise — one does not swear to 'facts' that one has no reasonable grounds for believing to be true.

Id.

187. *Id.* at 552.

188. 107 F.R.D. 775 (N.D. Ind. 1985).

189. *Id.* at 777. In *Martinez*, Landau filed a counterclaim alleging RICO violations by Martinez. Martinez, in response, filed a motion to dismiss the counterclaim on four grounds. Two of the grounds were arguably frivolous while the remaining two arguments were subsequently rejected by contrary Supreme Court decisions. *Id.* at 776-77.

190. *Id.* at 779.

Although another district court in the Seventh Circuit refrained from deciding whether to subscribe to *Martinez*,¹⁹¹ courts in other jurisdictions have specifically dealt with the concern.¹⁹² The Ninth Circuit Court of Appeals in *Golden Eagle Distributing Corp. v. Burroughs Corp.*¹⁹³ stated that "the fact that the court concludes that one argument or subargument in support of an otherwise valid motion, pleading, or other paper is unmeritorious does not warrant a finding that the motion or pleading is frivolous or that the rule has been violated."¹⁹⁴ An operation of Rule 11 which focuses on individual statements, as is the case in *Kelly*, chills an advocate's freedom to be enthusiastic and creative.

3. Lawyers in the Seventh Circuit, Take Heed!¹⁹⁵

The caustic approach to sanctions under Rule 11 by the Seventh Circuit Court of Appeals continues to have a profound chilling impact on litigators in that circuit. The theory that a judge who awards sanctions is "often advocating the correctness of his decision and is likely to do so by shaping the presentation of facts convincingly,"¹⁹⁶ gains more credence each time a decision is handed down by the Seventh Circuit. This is due, in large part, to the excessively punitive rationale which seems to underlie some of the recent decisions by that court.

For example, in *Szabo Food Service, Inc. v. Canteen Corp.*,¹⁹⁷ the Seventh Circuit Court of Appeals found that the plaintiff's due process claim was "wacky," reversed the district court's denial of a motion for sanctions, and remanded the case for the imposition of sanctions.¹⁹⁸ In its majority opinion, the court of appeals rebuked the district court because sanctions were denied without an explanation. The criticism of the district court's

191. See *Zick v. Verson Allsteel Press Co.*, 623 F. Supp. 927, 933 n.12 (N.D. Ill. 1985). "This Court need not now decide whether to subscribe to the recent dictum in *Martinez* . . . for the situation there was critically different from this one." *Id.*

192. See *Storage Tech. Partners v. Storage Tech. Corp.*, 117 F.R.D. 675, 681 (D. Colo. 1987). This court does not agree with *Martinez* that Rule 11 only addresses itself to pleadings in their entirety. The court asserts as its basis Rule 8(e)(2) of the Federal Rules of Civil Procedure which posits in regard to pleadings that "[a]ll statements shall be made subject to the obligations set forth in Rule 11." *Id.*

Even under *Storage Tech.*, the analysis concerning *In re Kelly* is not affected because *Kelly* involved an affidavit and Rule 8(e)(2) only applies to pleadings as defined in Rule 7(a) and 8(a). See also *In re Sheret*, 76 Bankr. 935, 937 (W.D.N.Y. 1987) (quoting *Martinez* as controlling).

193. 801 F.2d 1531 (9th Cir. 1986).

194. *Id.* at 1541.

195. See *Dreis & Krump Mfg. Co. v. International Ass'n of Machinists*, 802 F.2d 247, 256 (7th Cir. 1986).

196. Nelken, *supra* note 12, at 1339-40.

197. 823 F.2d 1073 (7th Cir. 1987).

198. *Id.* at 1075, 1080.

failure to explain its denial of sanctions was unwarranted, since an explanation is necessary *only* in instances when sanctions were actually imposed. Any other approach will increase a district court's burden by creating more work and will generate the potential for collateral litigation. Thus, in effect, the court of appeals totally disregarded Rule 11's admonition against ancillary proceedings.

The majority in *Szabo* also did not agree with the plaintiff's selection of cases cited in support of their due process argument, even though one of these cases explicitly approved the plaintiff's approach to due process.¹⁹⁹ It seems that the Seventh Circuit is imposing an affirmative duty to identify contrary authority in preparation of a claim, a concept which has been denounced by the Ninth Circuit Court of Appeals.²⁰⁰ Perhaps a more thorough inquiry into the law on the part of the majority would have revealed that the plaintiff's claim possibly had merit. The court failed to notice that "[d]ue process, unfortunately, is an area where creativity and frivolity sometimes threaten to merge,"²⁰¹ and in the words of the dissent, this "decision will reach as tellingly to the most meritorious [due process] claims as to the least."²⁰²

In the words of Judge Parsons, dissenting in *Hill v. Norfolk and Western Railway Co.*:²⁰³

The unmonitored act of assessing sanctions against a lawyer can too easily beget emotion. It is a common human tendency to find self assurance in anger when punishing, and that drive for self assurance itself tends to enhance the level of the punishment. In the performance of the judicial function, a court like any other person in authority too easily can lose sight of its otherwise dispassionate review of the facts and the law when it considers without a prior exchange of reasoning an assessment of sanctions.²⁰⁴

V. CONCLUSION

Rule 11 was designed to curb, not destroy, the advocate's zeal. At the outset of amended Rule 11, there was concern that this punitive provision

199. See *id.* at 1085 (Cudahy, J., dissenting). "Three Rivers Cablevision, Inc. v. City of Pittsburgh, 502 F. Supp. 1118 (W.D. Pa. 1980) has been *explicitly approved* by Northwest Disposal Co. v. Village of Fox Lake, 119 Ill. App. 3d 546, 551, 456 N.E.2d 691, 695 (1983)." *Id.*

200. See *supra* text accompanying notes 94-98.

201. *Szabo*, 823 F.2d at 1085 (Cudahy, J., dissenting).

202. *Id.* at 1086.

203. 814 F.2d 1192 (7th Cir. 1987).

204. *Id.* at 1203 (Parsons, J., dissenting).

might become "a new toy for lawyers."²⁰⁵ The question in the Seventh Circuit, however, has become when will the judges of the Seventh Circuit Court of Appeals put their new toy down. The new reasonable standard of Rule 11 has allowed, and may continue to enable, the Seventh Circuit to arbitrarily reprimand attorneys, resulting in the ruining of professional reputations.

Certainly, intentional abuse of the adversarial process should be sanctioned. However, the current approach to sanctions needs to be reconsidered in light of the original intent of Rule 11 to minimize frivolous claims, not creative litigation. Any other alternative will lead to a litigious nightmare culminating in the vindicated party leaping up and exclaiming, "I hereby move to sanction the sanction motion."²⁰⁶

MICHAEL J. MAZURCZAK*

205. Address by Arthur R. Miller, Annual Judicial Conference of the Second Judicial Circuit of the United States (Sept. 30, 1983), *reprinted in* 101 F.R.D. 161, 200 (1984).

206. *Id.*; see also *Stevens v. Lawyers Mut. Liab. Ins. Co. of N.C.*, 789 F.2d 1056 (4th Cir. 1986). Professor Miller's nightmare occurred in this case in which the plaintiff responded to the defendant's Rule motion by moving to sanction the sanction motion. The district court granted the defendant's motion for sanctions, denied the plaintiff's motion for sanctions, and awarded defendant costs incurred in responding to the plaintiff's sanction motion. *Id.* at 1059. The court of appeals found that the district court abused its discretion in granting the defendant's motion, but affirmed the denial of the plaintiff's motion for sanctions. *Id.* at 1060-61. The appellate court did not deal explicitly with the award of costs to the defendant.

* The author expresses his gratitude to Professor Christine M. Wiseman for her helpful comments on this article.